International Union of Operating Engineers, Local Union No. 542, AFL–CIO *and* Caretti, Inc. and Laborers District Council of Eastern Pennsylvania, Local No. 130 a/w Laborers International Union of North America, AFL–CIO. Case 4–CD–966

June 17, 1998

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

The charge in this Section 10(k) proceeding was filed August 27, 1997, by Caretti, Inc. (Caretti or Employer) alleging that the Respondent, International Union of Operating Engineers, Local Union No. 542, AFL–CIO (Operating Engineers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers District Council of Eastern Pennsylvania, Local No. 130 a/w Laborers International Union of North America, AFL–CIO (Laborers). The hearing was held October 21, 1997, before Hearing Officer Carmen P. Cialino Jr.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Pennsylvania corporation, is a masonry contractor operating out of its principal place of business in Camp Hill, Pennsylvania. During the past year, the Employer purchased and received goods valued in excess of $500,000 outside the Commonwealth of Pennsylvania. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Operating Engineers and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer is a subcontractor of Daniel Keating, a general contractor at a construction project at the Lackawanna Prison in Scranton, Pennsylvania. The project involves additions to the prison by building four masonry towers around the existing structure. At the time of the hearing, the Employer was in the first of two phases of the project, which is scheduled to be completed in 1998.

The Employer is a member of the Masonry Contractors Association of Central Pennsylvania (the Association) and is signatory to a multiemployer agreement between the Association and the Laborer's District Counsel of Eastern Pennsylvania, with which the Laborers is affiliated. Caretti has assigned all its work of supporting its masons and bricklayers to laborers.[1] Included in this assignment is the operation of a Pioneer Model 4000 crane, which Caretti recently purchased. The crane is mounted on a 1997 Ford truck and has the capacity to lift materials to a height of 100 feet and carry 30 tons of material.

B. *Work in Dispute*

The disputed work involves the operation of the Pioneer Model 4000 crane mounted on a 1997 Ford truck chassis, to be used to assist in performing the Employer's masonry subcontract at the Lackawanna County Prison.

C. *Contentions of the Parties*

The Employer contends that the employees represented by the Laborers have the exclusive right to operate the Pioneer Model 4000 crane by virtue of its collective-bargaining relationship with the Laborers. Caretti has no collective-bargaining relationship with the Operating Engineers. The Employer also argues that it has a practice of assigning laborers to operate this new crane as well as leased cranes of a similar capacity, although it has leased operators for heavier cranes of larger capacity. In addition, the Employer contends that it is the Employer's preference that the work be assigned to employees represented by the Laborers for, among other reasons, the economy and efficiency achieved by the crane operator's performing other laborer duties when not operating the crane, and because its employees have been trained in the operation of the specific Pioneer Model 4000 crane.

The Operating Engineers argues that the industry and area practice of assigning heavy crane work to operating engineers requires assignment of the work to employees it represents. In addition, the Operating Engineers contends that its members' 4-year apprenticeship and specialized training in crane operation, as compared with the cursory training received by the laborers, necessarily enhances the safety of the worksite. By contrast, the relative lack of training provided to the laborers,[2] Operating Engineers argues, undermines

[1] Caretti also has a collective-bargaining relationship with the Bricklayers Local 5, which is not involved in this dispute.

[2] Employee Wayne Miller, a member of the Laborer's Local 130, received 1 day's formal training on the operation of the Pioneer Model 4000 crane and 1 day of practice in the Employer's yard.

the efficient operation of the crane and increases the risk of injury on the job.

D. *Applicability of the Statute*

On August 25, 1997, Caretti employees drove the crane to the prison project and began using it to lift masonry supplies. Shortly thereafter, Operating Engineer Vice President and Business Agent Michael Mazza confronted crane operator Wayne Miller, and asked him if he was a member of a union. When Miller told Mazza he was a member of the Laborers, Mazza accused the Laborers of taking work away from the Operating Engineers through Miller's operation of the crane. Mazza also complained to the Employer's job superintendent, Roger Derr, and to a Laborer's steward on the job that a laborer was running the crane and informed them that he would not permit the Employer to establish the standards for the area.

The following day pickets arrived at the jobsite, led by Mazza, bearing placards of the Operating Engineers protesting the Employer's destruction of area standards. The picket line led to a work stoppage for that day as members of other trades refused to cross the picket line. The pickets have not returned since that day and work at the project has proceeded uninterrupted.

We find reasonable cause to believe that the Operating Engineers engaged in picketing at the Employer's jobsite with the object of forcing the Employer to assign the work of operating the Pioneer Model 4000 crane to employees represented by it rather than to employees represented by the Laborers, in violation of Section 8(b)(4)(D). We also find that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

There is no evidence that either labor organization has been certified to represent any of the Employer's employees. The Employer has had a collective-bargaining relationship with the Laborers through its multiemployer association. The contract encompasses the use of equipment necessary to lift masonry material, but the Employer admits that the contract does not expressly apply to crane operation. However, by letter dated August 13, 1997, the Employer informed the Laborers that it was assigning the work of operating the crane on the prison project to the Laborers in recognition of the fact that, under the collective-bargaining agreement, ''mason tenders have the assignment of operation and use of certain equipment as is necessary to lift, transfer, stock, and otherwise support the bricklayers installation of unit masonry and other masonry craft materials.'' The Laborers accepted the assignment in writing on August 22.

The Employer does not have a collective-bargaining relationship with the Operating Engineers, although it is undisputed that the Operating Engineers' contracts with other employers clearly cover crane operation.

We view the Employer's August 13 written assignment of the disputed to work the Laborers and the subsequent written acceptance of this work by the Laborers as a modification to the collective-bargaining agreement. Thus, we find that the factor of collective-bargaining agreement favors an award of the work in dispute to employees represented by the Laborers.

2. Employer preference and past practice

Caretti's chief executive officer, Hess, testified that Caretti prefers to assign the disputed work to employees represented by the Laborers and that it has never assigned any of its work to operating engineers. Hess testified that the Pioneer Model 4000 crane at issue is the first crane owned directly by Caretti. In the past, Caretti has leased truck-mounted cranes of similar capacity and has assigned the work of operating the leased cranes to its employees represented by the Laborers. On occasions when Caretti has required cranes with a higher height or weight capacity, it has leased both the crane and the operator.[3]

Caretti has used the Pioneer Model 4000 crane at one other jobsite—a 1-week project at Kutztown University—and used its Laborer-represented employee, Wayne Miller, to operate the crane.

Accordingly, we find that this factor of employer preference and past practice favors an award of the disputed work to the Employer's employees represented by the Laborers.

3. Area and industry practice

Operating Engineers Vice President and Business Agent Michael Mazza testified without contradiction that operating engineers operate the cranes on nearly

[3] There is no evidence whether the leased operator was a member of a labor organization.

all the union jobs in the area.[4] There is no evidence that laborers typically operate cranes in the geographical jurisdiction. Accordingly, this factor favors an award of the disputed work to employees represented by the Operating Engineers.

4. Relative skills and training

Caretti's employee, Wayne Miller, completed a 1-day, manufacturer-approved training on the operation of the Pioneer Model 4000 crane and practiced in the Company's yard before operating the crane for 1 week at the Kutztown University jobsite. Hess testified that he believes that Miller's training, coupled with his extensive experience lifting masonry supplies with the Company's forklifts and all terrain vehicles, enables him to operate the Pioneer Model 4000 crane safely.

Mazza testified that the Operating Engineers have a 4-year, Department of Labor-approved apprenticeship program and that its members are extensively trained to operate cranes. Mazza testified that he has referred hundreds of operating engineers to operate truck-mounted cranes but could not recall sending anyone to operate a Pioneer Model 4000 crane specifically. It is undisputed that employees do not require a license to operate a Pioneer Model 4000 crane in Pennsylvania.

Although there is no dispute that operating engineers receive superior training on crane operation in general, the record does not establish that operators of this particular crane require more training than Miller received in order to operate the crane safely. Nor is there any evidence that Miller was, in fact, operating the Pioneer Model 4000 crane in an unsafe manner. Accordingly, we find that this factor does not favor an award to employees represented by either Union.

5. Economy and efficiency of operations

Hess testified that his operations run more efficiently because his Laborer-represented employees who operate the Pioneer Model 4000 crane can perform other work when not required to operate the crane. On the other hand, Mazza testified that on occasion his members assist other trades at projects where they are employed as crane operators. Moreover, Mazza testified that Miller was slow and inefficient when Mazza observed him operate the Pioneer Model 4000 crane. We find, therefore, that this factor does not favor an award of the work in dispute to employees represented by either union.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements and employer preference and past practice. In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.[5]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Caretti, Inc., represented by Laborers District Council of Eastern Pennsylvania, Local No. 130 a/w Laborers International Union of North America, AFL–CIO, are entitled to operate the Employer's Pioneer Model 4000 crane at the Lackawanna County Prison project in Scranton, Pennsylvania.

2. International Union of Operating Engineers, Local No. 542, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Caretti, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Union of Operating Engineers, Local No. 542, AFL–CIO shall notify the Regional Director for Region 4 in writing whether it will refrain from forcing Caretti, Inc. by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

[4] In a small number of jobs, Teamster-represented employees may operate the cranes mounted on the trucks they drive to the construction sites

[5] The Employer has moved to expand the issue as to work in dispute beyond the Lackawanna Prison project to include the operation of its Pioneer Model 4000 crane at all future jobsites. The Employer has presented no evidence that the operation of its Pioneer Model 4000 crane has been a ''continuous source of controversy in the relevant geographic area or that it is likely to recur.'' See *Laborers (Paschen Contractors)*, 270 NLRB 327, 330 (1984). Nor has the Employer demonstrated that Operating Engineers Local No. 542 has demonstrated a ''proclivity to engage in further unlawful conduct in order to obtain the work in dispute.'' Id. Indeed, beyond the brief picketing that occurred August 26, 1997, the Operating Engineers has caused no further interruptions at the project. Accordingly, we deny the Employer's motion for a broad order covering the work in dispute.